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NO. 86-1694

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT T. SAVELY, ET AL.,
Petitioners

v.

CITY OF HOUSTON, TEXAS, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

RESPONDENTS' BRIEF IN OPPOSITION

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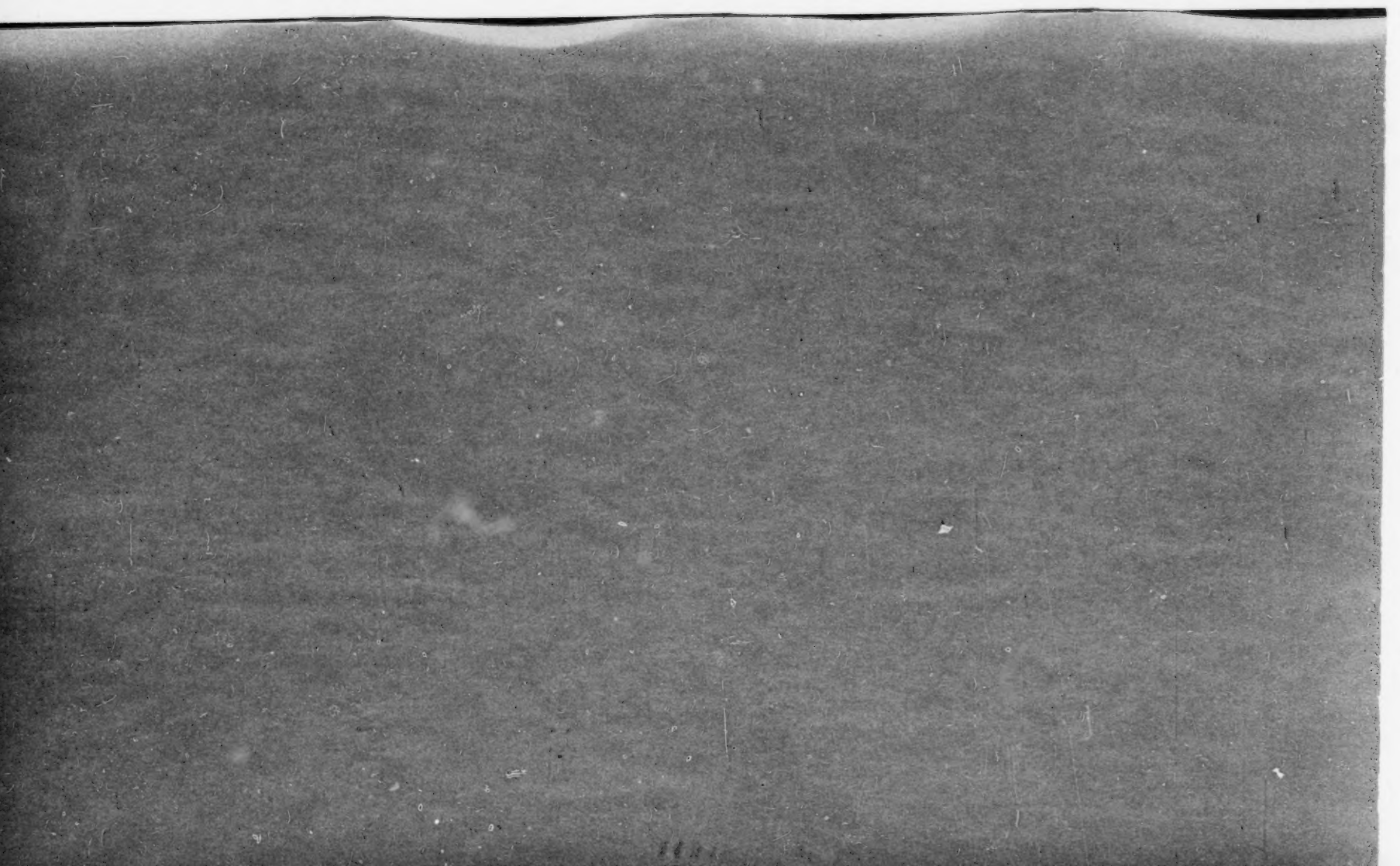

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, the City of Houston, Texas, et al. ("Houston"), respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion in this case by the Court of Appeals for the First Supreme Judicial District of Texas ("First Court of Appeals"). That opinion is reported at 708 S.W.2d 879 and is reprinted in the appendix to the petition for writ of certiorari ("petition") at page A1.

LACK OF JURISDICTION

Neither the Question Presented in the petition (p. i) nor any other federal issue was raised or decided in the First Court of Appeals or in the Supreme Court of Texas; therefore, this Court lacks jurisdiction in this cause.

STATEMENT OF THE CASE

Petitioners' statement of the case is convoluted, misleading, incomplete, and inaccurate. The following accurately reflects those facts material to consideration of the question presented in the petition. Unless otherwise indicated references are to the record in the district (trial) court. "Tr." refers to the Transcript of the record; "SF" refers to the Statement of Facts; and "Px." and "Dx." refer to plaintiffs' exhibits and defendants' exhibits, respectively.

This is a municipal annexation case. The validities of two Houston annexation ordinances, No. 77-1423 (Dx. 5) and No. 77-1668 (Dx. 11), were in issue in the district court. The opinion of the First Court of Appeals correctly states the nature and result of the case.

Ordinance No. 77-1423, referred to by petitioners as the "strip annexation ordinance," was enacted on August 27, 1977. Ordinance No. 77-1668, referred to by petitioners as the "block annexation ordinance," was enacted approximately three months later on November 23, 1977. The boundaries of the territory described in and annexed by the latter ordinance encompass all of the territory described in and annexed by the former ordinance. The validity of such latter ordinance is in no manner dependent upon the validity of such former ordinance. Therefore, as held by the First Court of Appeals, the

validity of Ordinance No. 77-1423 is an immaterial or moot question. For this reason, the matters hereafter set forth relate to facts and issues peculiar to Ordinance No. 77-1668.

Houston's Authority to Annex. Houston is a home rule city of the State of Texas. The home rule charter of the City (HOUSTON, TEX., CHARTER, art. I, §2b [1913]) provides in pertinent part the following:

> The City Council shall have power by ordinance to fix the boundary limits of the said City of Houston and to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said City with or without the consent of the territory and inhabitants annexed.

TEX. REV. CIV. STAT. ANN. art. 1175 (Vernon 1963) enumerates certain of the powers of Texas home rule cities:

> Cities adopting the charter or amendment hereunder shall have full power of local self-government and among the other powers that may be exercised by any such city the following are hereby enumerated for greater certainty:

Section 2 of such Article reads in pertinent part as follows:

> The power to fix the boundary limits of said city, to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said city, . . . according to such rules as may be provided by said charter not inconsistent with the procedural rules prescribed by the Municipal Annexation Act.

During all material times, the Municipal Annexation Act (TEX. REV. CIV. STAT. ANN. art. 970a, § 6 [Vernon 1963]; 1965 TEX. GEN. LAWS, ch. 163, § 1 at 345) provided in pertinent part the following:

> Before any city may institute annexation proceedings, the governing body of such city shall provide an opportunity for all interested persons to be heard at a public hearing . . . Notice of such hearing shall be published in a newspaper having general circulation in the city and in the territory proposed to be annexed. The notice shall be published at least once in such newspaper not more than twenty (20) days nor less than ten (10) days prior to the hearing.

The public hearings regarding both Ordinance No. 77-1423 and Ordinance No. 77-1668 were duly and timely noticed and held. These facts are not in dispute.

Petitioners' Pleadings in the Trial Court. Petitioners filed their suit in 1977; they went to trial on their Eighth Amended Original Petition (Tr. 135). Such pleading challenged the validity of both ordinances on a variety of grounds; however, only those allegations contained in paragraphs XIX and XXIX thereof are of possible pertinence here. Such paragraphs read, respectively, as follows:

> XIX.
>
> First, the actions of Defendants as to both the Strip Annexation and the Block Annexation denied to Plaintiffs and others the opportunity to be heard in violation of Section 6 of the Municipal Annexation Act.
>
> . . . . .

XXIX.

> Defendants denied to Plaintiffs and others an opportunity to speak, assemble, or petition their government. Such denial by Defendants infringed the First Amendment rights of Plaintiffs in that local officials discriminatorily exercised their discretion and prohibited Plaintiffs and other residents of Clear Lake City from having an equal opportunity to express their views as were customarily afforded to other persons and other groups in violation of U. S. CONST. amend. 1 and TEX. CONST. article 1, section 8.

Petitioners pursued the former of these allegations throughout the trial and appeal of this cause. However, the latter allegation (First Amendment) was not further mentioned, advanced, or pursued in the trial or appellate courts of Texas.

A few months before trial, the State, on the relation of petitioners and acting by and through the County Attorney of Harris County, Texas, intervened in the cause by filing an information in the nature of quo warranto (Tr. 44). However, such plea challenged only the validity of Ordinance No. 77-1423; and that challenge was based solely on procedural grounds. No constitutional issues were raised in intervenor's pleadings.

This case was tried before a jury in November of 1984. At the conclusion of the evidence, it was submitted to the jury on eleven Special Issues, most of which were answered favorably to petitioners. The only such special issue of possible materiality here (Special Issue No. 4; Pet. App., p. A19; Tr. 77) inquired whether "[A]ll plaintiffs wishing to be heard before the Houston City Council on the subject of the block annexation Ordinance

No. 77-1668, were not given the opportunity to be heard?" As submitted by the trial court, the only answers to this Issue available to the jury were "All plaintiffs were not heard" or "All plaintiffs were heard." The jury answered "All plaintiffs were not heard." There was not a jury finding that all plaintiffs were not given the opportunity to be heard.

Procedures Governing the Public Hearings. The following provisions from HOUSTON, TEX., CODE, art. I, § 2.2 (1968) were in effect during all material times:

> The following rules of procedure shall govern all meetings and proceedings of the city council . . . :
>
> (f) *Right of citizens to be heard.* Any citizen of the City shall have a reasonable opportunity to be heard at all regular and special meetings in regard to any and all matters to be considered at such meetings that are germane and relative to any subject matter of city affairs or business which is within the scope of the authority and legislative functions of the city council. Provided, however, that the time allowed for each citizen's appearance before city council shall be limited to five minutes unless the rules of council be suspended. Any member of the city council shall have the privilege of raising a point of order as to whether the subject matter to be heard and considered as presented by a citizen is germane and relative to any subject matter of city affairs or business that are to be considered by the city council.

By Motion No. 74-2838, passed by the Houston City Council on August 21, 1974, and relating to public appearances before the City Council, the following policy regarding reserving time to speak was adopted:

> You may come in person to the City Secretary's Office, Room 203, Second Floor, City Hall or call

> 222-3301. Your reservation must be made prior to 9:00 o'clock a.m. of the Wednesday on which you wish to appear. For night meetings held at 7:00 o'clock p.m., reservations must be made by 5:00 o'clock p.m. on the day of the meeting. No reservations will be accepted by the City Secretary's Office after this time.

By Motion No. 76-347, adopted by the Houston City Council on January 27, 1976, the following rules were established by the City Council for public hearings "in addition to the rules of Council governing appearances by members of the public at the Regular Council Meeting each week:"

1. That time be reserved not later than one hour prior to the time scheduled for the hearing to begin;
2. That each speaker be allowed a maximum of five minutes;
3. That the speakers be grouped in categories by the amount of time required.

Summary of the Evidence. The following is a summary of the material evidence introduced at trial relating to Special Issue No. 4 (the "opportunity to be heard" issue regarding Ordinance No. 77-1668) and to the Question Presented in the petition:

The public hearing regarding Houston's proposal to institute proceedings to annex the territory subsequently annexed by Ordinance No. 77-1668 was held by the Houston City Council in the Council Chambers of the City Hall over a span of three days, August 9, 10, and 12, 1977, and consumed more than sixteen hours (Dxs. 8, 9, and 10). At the outset of the hearing, Houston's

Mayor publicly announced that any comments submitted in writing would also be considered by the City Council (Dx. 8).

Two hundred ninety-one persons reserved time to speak at such hearing; however, several of these cancelled their request to speak before the hearing began (Dx. 7). The name of each person who reserved time to speak was called during the course of the hearing and that person was afforded the opportunity to address the City Council at that time (Dxs. 8, 9, and 10). One hundred and seventy-nine persons responded when their names were called; all spoke in opposition to the proposal of the City Council to institute the annexation proceedings in issue (Dxs. 8, 9, and 10).

Nine of the twelve individual petitioners (plaintiffs in the trial court) registered to speak at the hearing (Dx. 7). Of this nine, two (Karen Atkinson and James R. Atkinson) did not respond when their names were called (Dx. 10, p. 3); the other seven (Lapidus, Swerdlin, Savely, Riley, Farries, James L. Allison, and Susan R. Allison) did respond and spoke in opposition to the proposed annexation (Dx. 8, pp. 1-6 and Dx. 10, pp. 1-2). In addition, two of petitioners' attorneys spoke in opposition to the proposed annexation (Dx. 8, pp. 2-3).

During the course of trial, three plaintiffs (petitioners) presented testimony regarding the public hearing. Mr. Riley stated that he registered to speak and did in fact speak in opposition to the proposed annexation (SF 422). Mr. Savely was uncertain as to whether he registered to speak and as to whether he did speak at the hearing (SF 730). The official minutes of the City Council (Dx. 8, p. 2) confirm that both Mr. Riley and Mr. Savely

spoke in opposition to the proposed annexation during the course of the hearing on August 9, 1977.

Mrs. Jocelyn (Lynn) Otto testified that she reserved time to speak at an annexation public hearing, but that she did not speak. She stated that because of the lapse of time she was uncertain as to the public hearing for which she registered to speak, but believed it was the one held in August rather than the one held in July (SF 683). (The July public hearing related to the other annexation ordinance originally in issue, No. 77-1423, and has no materiality here). Mrs. Otto said that she thought she attended a portion of such August hearing on one or two days and if her name was called during such time she did not hear it (SF 689-690).

The only matter Mrs. Otto testified to with any degree of certainty was that she specifically recalled that her name was the last name appearing on the list of those persons who reserved time to speak. She stated that the reason she was certain of this was because she had made her reservation to speak by telephone; that when she arrived for the hearing her name did not appear on the list of those who had registered to speak; that she called this omission to the attention of someone in the City Secretary's office; and that she saw that person place her name on the list as the last speaker (SF 681-682).

Mrs. Otto's name does not appear on the list (Dx. 7) of those who reserved time to speak at the August 9, 10, and 12 hearing pertaining to the territory subsequently annexed by Ordinance No. 77-1668; however, it does appear, as the last name, on the list of those persons who reserved time to speak at the public hearing on July 26, 1977 (Dx. 3) regarding the proposal to institute

proceedings to annex that territory ultimately annexed by Ordinance No. 77-1423.

Other than the vague testimony of Mrs. Otto, there was no evidence suggesting or implying that any plaintiff wishing to be heard at the public hearing in issue was not afforded that opportunity. There was no evidence that such public hearing was not fairly conducted. There was no evidence that the Houston City Council was not keenly aware of opposition to its proposal to institute annexation proceedings. There was no evidence that the Houston City Council was not fully apprised of each and every reason why petitioners and others were opposed to the annexation of the territory in issue.

Other than the qualified testimony of Mrs. Otto, there was no evidence that anyone who registered to speak at the public hearing was not called upon to speak and afforded the opportunity to express his or her views. There was no evidence that Mrs. Otto was denied the opportunity to speak at such hearing. There was no evidence that she advised the City Council, or any other representative of the City, that she had registered to speak, or that her name had not been called, or that she desired to be heard. And there was no evidence that had she spoken she would have advanced any reasons for being opposed to the proposed annexation different from those reasons advanced by the one hundred seventy-nine persons, including her attorneys and seven of her fellow petitioners, who did speak.

Rules Governing Appellate Procedure in Texas and the Appellate History in This Case. After the jury returned its verdict (Tr. 74), petitioners filed a motion for judgment based on such verdict (Tr. 103). Houston

filed a motion for judgment non obstante veredicto (Tr. 84). The former was granted; the latter was denied (Tr. 115, 124). Neither in such motion for judgment (Tr. 103) nor the accompanying brief in support thereof did petitioners mention or allude to a constitutional issue in any manner or make reference to a provision of the Constitutions of the United States or of the State of Texas. The judgment of the trial court (Pet. App., p. A16; Tr. 115) was based solely on the jury's verdict; it does not mention or allude to or was it based on a constitutional issue.

Houston timely appealed the district court's judgment to the First Court of Appeals. Procedural rules governing the appeal of judgments in Texas courts are prescribed by the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure. An appeal from a judgment of a district court to a court of appeals is by brief. Requirements relating to such a brief are set forth in TEX. R. CIV. P. 414 (Vernon 1985), which provides in pertinent part the following:

> (d) Points of Error. A statement of the points upon which the application is predicated shall be stated in short form without argument and be separately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found.
>
> (e) Brief of the Argument. The brief of the argument may present separately, or grouped if germane, the points of error relied upon for reversal. The argument should include such pertinent statements from the record as may be requisite, together with page references and such discussion of the authorities as is deemed necessary to make clear the point of error complained of.

TEX. R. CIV. P. 420 (Vernon 1985) relates to appellees' brief. Such rule reads as follows:

> The brief of the appellee shall reply to the points of error relied upon by the appellant in due order when practicable; and in case the appellee desires to complain of any ruling or action of the trial court, his brief in regard to such matters shall follow substantially the form of the brief for appellants.

As a matter of practice and procedure in Texas, points of error advanced by an appellee in a court of appeals are denominated "cross points of error." As appellees in the First Court of Appeals, petitioners advanced two cross points of error; however, neither related to the Question Presented here; neither addressed a constitutional issue. Rather, both such cross points, which are quoted below, related to procedural matters under the Municipal Annexation Act:

> *Cross Point 1.* The judgment of the trial court should be affirmed for the reason that Appellants failed to comply with TEX. REV. CIV. STAT. ANN. art. 970a, Sec. 6, in that Ordinance No. 77-1668 was not completed within 90 days of the institution of annexation proceedings.
>
> *Cross Point 2.* The judgment of the trial court should be affirmed for the reason that Appellants failed to comply with TEX. REV. CIV. STAT. ANN. art. 970a, Sec. 6, in that a public hearing regarding Ordinance No. 77-1423 was held less than 10 days after the proceedings relative to Ordinance No. 77-1423 were instituted.

Neither by cross point of error nor by argument in their brief in the First Court of Appeals did petitioners raise,

mention, or allude to a constitutional issue of any nature. Nor did the judgment and opinion of such court (Pet. App., p. A1), which reversed the judgment of the trial court and rendered judgment upholding the validity of Ordinance No. 77-1668, address, consider, mention, or pass upon such an issue.

Petitioners' motion for rehearing in the First Court of Appeals contained forty-eight alleged points of error, ten of which (Pet. App., pp. 21-23) petitioners now contend raised the constitutional issues set forth in the Question Presented. None of such ten points of error mentions a constitutional provision or issue or infers the presence of any constitutional question. Indeed, all such points of error relate to procedural matters under the Municipal Annexation Act (TEX. REV. CIV. STAT. ANN. art. 970a [Vernon 1963; Vernon Supp. 1986]).

During all material times, TEX. R. CIV. P. 468 (Vernon 1985), now TEX. R. CIV. P. 130 (Vernon Supp. 1987), provided in pertinent part the following regarding the method of review of judgments of a Court of Appeals by the Supreme Court:

> (a) Method of Review. The Supreme Court may review final judgments of the court of appeals upon writ of error.

TEX. R. CIV. P. 469 (Vernon 1985), now TEX. R. APP. P. 131 (Vernon Supp. 1987), prescribes the requisites of an application for writ of error. It provides in pertinent part the following:

> (e) Points of Error. A statement of the points upon which the application is predicated shall be stated in short form without argument and be separ-

> ately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found. Whether the matter complained of originated in the trial court or in the Court of Appeals, it must be assigned as error in the motion for rehearing in the Court of Appeals. Points will be sufficient if they direct the attention of the court to the error relied upon. Complaints about several issues or findings relating to one element of recovery or defense may be combined in one point, if separate record references are made.
>
> (f) Brief of the Argument. The brief of the argument may present separately or grouped if germane, the points of error relied upon for reversal, the argument to include such pertinent statements from the record as may be requisite, together with page references and such discussion of the authorities as is deemed necessary to make clear the points of error complained of. The opinion of the Court of Appeals will be considered with the application, and statements therein, if accepted by counsel as correct, need not be repeated.

Petitioners' application for writ of error to the Supreme Court of Texas assigned forty-four points of error. Ten of these (Pet. App., pp. A24-26) are relied upon by petitioners as support for their claim that the Question Presented was raised in such court. None of such points of error or the arguments advanced thereunder contains a reference to a constitutional provision or mentions, advances, or alludes to a constitutional issue. Indeed, each such point of error relates solely to issues regarding procedures under the Municipal Annexation Act (TEX. REV. CIV. STAT. ANN. art. 970a [Vernon 1963; Vernon Supp. 1986]).

As reflected in the petition, the Supreme Court of Texas refused petitioners' application for writ of error with the notation "no reversible error." TEX. R. APP. P. 190 (Vernon 1986) authorizes the filing of a motion for rehearing following an order of the Texas Supreme Court refusing an application for writ of error. Such rule reads in part as follows:

> (b) Contents and Service. The points of error relied upon for the rehearing shall be distinctly specified in the motion.

Petitioners filed such a motion for rehearing and set forth therein only one point of error, which reads as follows:

> Petitioners' Application for Writ of Error should be granted because the territory purportedly annexed by Houston was not within the exclusive extraterritorial jurisdiction (ETJ) of Houston as a matter of law, but was instead within the ETJ or territorial boundaries of other municipalities as a matter of law.

Challenge of Petitioners' Statement of the Case. As heretofore stated, petitioners' statement of the case is inaccurate and misleading; it is also argumentative. Houston will not address each of these inaccuracies, misrepresentations, and arguments, but feels compelled to respond to the following:

Petitioners' state that the "annexation also precluded residents from voting in the Houston election in November of 1977" (Pet. p. 3). This is a base canard. The annexation did not preclude anyone from voting. Those persons who were duly registered to vote and who resided in Houston at the time of such election were entitled to vote

at such election. This matter was not and is not an issue in this case. Houston can only assume it is mentioned here because petitioners feel it may imply some underlying sinister and devious ploy by Houston.

Of similar character and purpose is the statement made by petitioners under their argument wherein they represent that "the purpose of the two-step annexation process was to disenfranchise residents of the Clear Lake Area" (Pet. p. 7). Such statement is totally false. The "two-step annexation process" did not disenfranchise anyone; that was neither its purpose nor its effect. There is not a shred of evidence to support petitioners' statement and, indeed, the matter mentioned therein was not an issue below and is not an issue here.

Petitioners' statement that "[e]ach of the hearings was designed and conducted to deny a fair hearing to those opposed to the Clear Lake annexations" (Pet. p. 3) is untrue, has no support in the record below, and is contrary to the specific holding of the First Court of Appeals (Pet. App., p. A3).

Finally, petitioners' dogmatic assertion that there "constitutional arguments were fairly brought to the attention of the Texas courts" (Pet. p. 5) is argumentative, blatantly untrue in Houston's opinion, and a matter for this Court, not petitioners, or respondents, to decide.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither the decision below nor the record raises the Question Presented in the petition.

Under the circumstances of this case, the jurisdictional statute involved requires that petitioners must have specially set up or claimed in the highest state court that right or privilege under the Constitution of the United States which they seek to have invoked in this Court. 28 U.S.C.A. § 1257(3) (West 1966; West Supp. 1987). This they did not do.

Additionally, SUP. CT. R. 21(h), 28 U.S.C.A. (West 1984), requires petitioners to "specify the stage in the proceedings in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court." This petitioners did not and, under the record, cannot do; their attempt to do so is strained, constrained, and wanting.

Neither the Question Presented nor any element thereof was raised in the First Court of Appeals or the Supreme Court of Texas. No opinion was issued by the latter court; it simply refused petitioners' application for writ of error with the notation "no reversible error." The opinion of the First Court of Appeals (Pet. App. p. A1) does not mention, much less pass upon, the Question Presented or any other federal issue; it does not cite a constitutional provision or any authority relating thereto. And it is firmly established that when "the highest state court has failed to pass upon a federal question, it will

be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary." *Street v. New York,* 394 U.S. 576, 582 (1969); *Fuller v. Oregon,* 417 U.S. 40, 50 n. 11 (1974). Petitioners have not and, under the record below, cannot meet this burden.

By their pleadings in the trial court, petitioners alleged generally that Houston "infringed the First Amendment rights of Plaintiffs." (Pet. p. 4). Such pleadings made no mention of the Fourteenth Amendment or did they contain any allegation regarding the deprivation of a right or privilege guaranteed thereby. From and after the filing of said pleadings, petitioners' actions clearly establish that they abandoned such First Amendment claim in the state courts. They did not further assert such claim in the trial court. The judgment of that court (Pet. App., p. A15) does not address or mention a constitutional issue, federal or state. As appellees in the First Court of Appeals, petitioners had the opportunity to raise the First Amendment issue, but they did not. They presented two cross points of error (*supra,* p. 12) in their brief in such court; however, neither remotely related to a constitutional issue. And, as heretofore stated, the opinion of the First Court of Appeals (Pet. App. p. A1) does not, expressly or impliedly, pass upon the Question Presented or any other constitutional issue; or does it mention or allude to a constitutional provision or question or cite any authority applicable to the same.

None of the forty-eight points of error set forth in petitioners' motion for rehearing in the First Court of Appeals and none of the forty-four points of error relied on by them in their application for writ of error to the

Supreme Court of Texas mentions a constitutional provision or expressly or impliedly raises the Question Presented here or any other constitutional issue. The same is true with respect to the argument and authorities advanced by petitioners under the various points of error contained in their application for writ of error.

Petitioners acknowledge that they did not cite or refer to any constitutional provision in the various points of error set forth in their application for writ of error (Pet. p. 5). They also acknowledge, at least tacitly, that they did not cite or refer to any constitutional provision or issue in the arguments advanced by them in their brief in the First Court of Appeals and in their application for writ of error in the Supreme Court of Texas.

As sole support for their contention that they raised the Question Presented in the First Court of Appeals, petitioners quote, out of context, one sentence and a part of another from their lengthy brief (Pet. p. 4). Neither of such sentences was advanced in connection with nor makes reference to a constitutional provision or question. Neither has substance, nor support in the evidence, nor is accompanied by citation to supporting authority. Further, petitioners' brief in the First Court of Appeals is not a part of the record before this Court and argument made therein cannot be used to establish that a federal question was raised below. *Live Oak Water Users' Ass'n v. Railroad Commission of California,* 269 U.S. 354 (1926). Even if the sentences under discussion had specifically mentioned a federal issue, such act would not constitute a proper predicate for the Question Presented. The mere mention of such a matter in a sentence in the argument of a lengthy brief does not raise the issue. *Beck v. Washington,* 369 U.S. 541, 553 (1962).

The foregoing notwithstanding, the issue is not whether the Question Presented was raised in the First Court of Appeals, but whether it was raised in the Supreme Court of Texas, "the highest state court." 28 U.S.C.A. § 1257 (West 1966; West Supp. 1987); *Benton v. Maryland*, 395 U.S. 784 (1969).

Petitioners set forth ten of the points of error included in their application for writ of error to the Texas Supreme Court (Pet. App., pp. A24-26) and, by implication at least, contend that each and all of such points raised in such court the Question Presented here. Such contention is without merit. None of such points of error mentions a constitutional provision or expressly or impliedly asserts a constitutional issue. The first nine of such points refer specifically to the Municipal Annexation Act and relate solely to questions regarding compliance with procedural requirements set forth therein. The thrust of the tenth is that the First Court of Appeals "failed to use the correct rules of law in reviewing the sufficiency of the evidence." Certainly, none of these points of error raised a constitutional issue. Certainly, there is nothing in the record of this cause that shows, as this Court requires, that the federal claim advanced here was brought to the attention of the Supreme Court of Texas with "fair precision." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

The record below clearly reflects that petitioners did not make proper presentation of the Question Presented in the state courts. This fact is underscored by the following well established rules regarding appellate practice and procedure in Texas:

Alleged error of a Court of Appeals not raised by point of error in an application for writ of error in the Supreme

Court is waived. *Life Insurance Co. of North America v. First National Bank of Fort Worth,* 464 S.W.2d 362 (Tex. 1971). Even if a question is presented by point of error in an application for writ of error, if it were not preserved in a motion for rehearing in the Court of Appeals it could not be considered by the Supreme Court. *Wallace v. Scrogum,* 372 S.W.2d 941 (Tex. 1963). And, even if properly raised, a point of error not briefed is waived. *La Sara Grain Co. v. First National Bank of Mercedes,* 673 S.W.2d 558 (Tex. 1984).

Petitioner did not present the Question Presented, or any shade thereof, by point of error in their application for writ of error to the Texas Supreme Court or by point of error in their motion for rehearing in the First Court of Appeals, or did they cite any constitutional provision or advance any constitutional issue by argument in either their brief in such Court of Appeals or in their application for writ of error in the Supreme Court. This total failure of petitioners to advance or preserve the Question Presented in the state courts is forcefully demonstrated by their motion for rehearing in the Supreme Court of Texas wherein they set forth only one point of error (*supra,* p. 15) and it was totally unrelated to any constitutional issue. And having failed to pursue such question in the Supreme Court of Texas in the manner and with the specificity required by established rules of appellate practice in Texas, petitioners have waived any right they might otherwise have had to have this Court consider the same. *Beck v. Washington,* 369 U.S. 541 (1962); *Baily v. Anderson,* 326 U.S. 203 (1945).

Petitioners wholly failed to raise the constitutional issue in question in the state appellate courts; none of such courts considered or ruled on that or any other constitu-

tional issue; therefore, this Court is without jurisdiction in this case and the petition should be dismissed. *Webb v. Webb*, 451 U.S. 493 (1981); *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

2. The Question Presented has no factual support in the record.

Not only did petitioners fail to raise any federal issue in the appellate courts of Texas, the Question Presented has absolutely no factual support in the record below. For this reason such question fails to comply with the requirements of SUP. CT. R. 21, 28 U.S.C.A. (West 1984); it is not expressed in the terms and circumstances in the case.

Nothing in the record suggests even remotely that the City Council of Houston imposed any "content-based restrictions" on those who spoke or appeared to speak at the public hearing in issue; or that it "arbitrarily limited" the number of speakers at such hearing; or that it called "persons to speak in an undisclosed order." Such Question Presented is further hypothetical and abstract in that it inquires of "persons" generally rather than of "petitioners." For each and all of the foregoing reasons, said question calls for an impermissible advisory opinion. *Bell v. Maryland*, 378 U.S. 226, 237 (1964).

There was no evidence that the Houston City Council imposed any "content-based restrictions" on those who spoke or appeared to speak at the public hearing. Indeed, all evidence was to the contrary. All interested persons who wished to speak at the hearing were afforded that opportunity, regardless of their position on the matter under consideration. All they were required to do was to

register to speak and to be present when their names were called. Certainly nothing can more forcefully establish the "content-neutrality" of these requirements than the undisputed facts in this case. Of the one hundred seventy-nine persons who actually spoke at such hearing, all spoke in opposition to the proposed annexation.

There was no evidence that the City Council, arbitrarily or otherwise, limited the number of speakers at the hearing in issue. Any and all persons who registered to speak and responded when their names were called were permitted to speak. The only possible basis for petitioners' representations that the City Council "arbitrarily" limited the number of speakers at the hearing must be the qualified testimony of Mrs. Otto. Such testimony has previously been summarized herein (*supra,* p. 9). Mrs. Otto thought she registered to speak at the hearing; she attended a portion of such hearing; she desired to speak; she did not speak; and if her name were called to speak she did not hear it. Her name was not called; it did not appear on the list of those who reserved time to speak at the hearing. However, she was not denied the opportunity to speak. There was no evidence that she, or anyone else, advised the City Council or any other City official that her name had not been called or that she desired to speak. There was no evidence that any member of the City Council knew Mrs. Otto; or knew that she was present at the hearing, or that she desired to speak, or what her position was regarding the proposed annexation.

There was no evidence that at the hearing in issue the City Council called "persons to speak in an undisclosed order." Under the rules of the City Council (*supra,* pp. 6-7), speakers were "grouped in categories" by the amount of time requested. The list of speakers was pre-

pared by the City Secretary. Names were called generally in the order they appeared on such list (Dxs. 7, 8, 9, and 10). A copy of the list was on a table outside the entrance to the Council Chamber and available for inspection by all persons. Another copy was in the nearby office of the City Secretary and, as a public record and by policy of that office, was readily available for examination by any interested person before and throughout the hearing. Further, Mrs. Otto, herself, testified that she saw the list; that opposite each name appearing thereon was a number; and that such names were called to speak in numerical order (SF 681-82, 686).

The evidence firmly establishes that the City Council procedures governing the time, place, and manner of such hearing were fair and reasonable and that the hearing was conducted in a "content-neutral" fashion. See *Cox v. New Hampshire,* 312 U.S. 569 (1941); *Consolidated Edison Co. of New York v. Public Service Commission of New York,* 447 U.S. 530, 534 (1980). This is clearly reflected by the opinion of the First Court of Appeals (Pet. App., p. 1). After reviewing all of the evidence in this case, that court specifically held that an "orderly and reasonable procedure was followed in calling on the speakers, and there is no evidence that the city stifled the opposition to its proposed action." The court further found that "there is no evidence that Mrs. Otto was denied the opportunity to be heard."

3. The Question Presented is insubstantial; and the judgment of the First Court of Appeals was based on independent and adequate state grounds.

From what has gone before, it is readily apparent that the Question Presented, even if it were properly before

this Court, does not raise a substantial federal issue. Under the circumstances of this case, such question is not only academic and episodic, it is so devoid of merit that it is frivolous.

The hearing in issue was a requirement of the Texas legislature, not of the federal constitution. Absent such legislative requirement, Houston could have consummated the subject annexation without notice or hearing. The only person possibly impacted by the Qustion Presented is Mrs. Otto. She was not denied the opportunity to be heard; had she been, the opinion below would likely have been different. She was not denied a First Amendment right; had she been she could have sought injunctive relief or damages against Houston under 42 U.S.C.A. § 1983 (West 1981). However, certainly under the circumstances of this case, such denial, even if it had occurred, would not and could not invalidate the ordinance (No. 77-1668) by which the territory proposed to be brought into the City at such hearing was ultimately annexed to Houston. As reflected by the opinion of the First Court of Appeals, such annexation fully complied with all requirements of state law.

This Court has long held that the "number, nature, and duration of powers" conferred on municipal corporations and the territory over which such powers shall be exercised "rests in the absolute discretion of the state"; and that questions relating to the "policy, wisdom, justice, or fairness" of legislative enactments relating to municipal annexations are "not subject to review or criticism by this court." *Hunter v. City of Pittsburgh,* 207 U.S. 161 (1907). See *State ex rel. Pan American Production Co. v. Texas City, Texas,* 303 S.W.2d 780 (1957), appeal dismissed, 355 U.S. 603 (1958).

Neither the Question Presented nor any other constitutional issue was raised or decided below. In the absence of an affirmative showing by petitioners that a federal question was presented to the state appellate courts and that a decision on such question was necessary to a determination of this cause, the petition must be denied, especially when, as here, the judgment below was based on adequate state grounds. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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